Testimony of Richard D. Friedman
before the
Michigan House Judiciary Committee
on S. 263
February 15, 2006

I thank the Committee for giving me the opportunity to testify today in connection with S. 263. I am the Ralph W. Aigler Professor of Law at the University of Michigan Law School. The subject of this bill is of particular interest to me. I have taught and written in the field of Evidence for more than two decades. Much of my academic work recently has been on the right of a criminal defendant to be confronted with the witnesses against him, which is protected by the Sixth Amendment to the United States Constitution and by Article I, Section 20 of the Michigan Constitution. In fact, I maintain "the Confrontation Blog," devoted exclusively to the subject, at www.confrontationright.blogspot.com. Let me emphasize from the outset that as an academic, and I like to think an independent-minded one, I favor the defense on some issues related to confrontation and the prosecution on others.

I have long contended that a statement that is testimonial in nature cannot be introduced against a criminal defendant if he has not had an opportunity to be confronted with the person who made the statement. This is essentially the theory adopted by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004). In general terms, *Crawford* says that if a statement is testimonial in nature, it cannot be introduced against a criminal defendant unless he has had an opportunity to cross-examine the maker of the statement *and* she either testifies at trial or is unavailable to do so; whether the statement is trustworthy or not is immaterial to the confrontation issue.

Two cases currently pending before the Court, *Davis v. Washington*, No. 05-5224, and *Crawford v. Indiana*, No. 05-5705, will test the bounds of the *Crawford* doctrine, and in particular the question of what statements are testimonial. I am counsel for the petitioner in *Hammon*. The cases will be argued on March 20, and expect that the Court will decide them by June at the latest. Both cases involve accusations of domestic violence made to governmental officials – to a 911 operator in *Davis* and to a responding police officer in *Hammon*. In each case, the complainant did not testify at trial, the prosecution introduced evidence of the accusation over the accused's objection, and the accused was convicted. The state supreme courts ultimately affirmed the convictions, the defendants petitioned to the United States Supreme Court for *certiorari*, and the Court granted the petitions. Each petitioner contends that admission of the accusation in his case violated his right under the Confrontation Clause of the United State Constitution to "be confronted with the witnesses against him."

Frankly, I believe that the arguments in our favor are overwhelming. For hundreds of years, it has been a cornerstone of the Anglo-American system of criminal law that a witness against the accused must testify "face-to-face" with the accused, under oath and subject to cross-examination, and in no other way. To allow accusations of the sort involved in these cases to be admitted against a criminal defendant would effectively be to allow a complainant to testify by making a 911 call – what my colleague Bridget McCormack and I have called "dial-in

testimony" – or by speaking to a responding officer, without the need to come to court, take an oath, face the accused, and answer cross-examination Whatever the crime, from petty theft to murder, the accused has a right to be confronted with the witnesses against him; domestic violence is no different. Just what the definition of "testimonial" is under *Crawford* has not yet been resolved, but under what I believe is an appropriate definition – roughly, statements made under circumstances in which a reasonable person would anticipate that the statement would be used investigation or prosecution of a crime – these statements are clearly testimonial. Indeed, we are suggesting that the Court need not even resolve the precise meaning of "testimonial"; it is enough if the Court adopts the simple, intuitively appealing principle that an accusation made to a known police officer (or other government agent with significant law enforcement responsibilities) invokes the protection of the Confrontation Clause. My eight-year-old son understands that proposition, and I expect the Court will as well. (If the witness cannot testify because of the accused's wrongdoing – if, for example, he murders or intimidates her – the accused may in proper circumstances be held to have forfeited the right, because he cannot complain about a situation created by his own wrongdoing. But it would be utterly inappropriate to treat the matter as if the accused had forfeited the right in every case.)

Now, I would like to persuade you that this argument is correct – but if we persuade a majority of the Supreme Court, and I fully expect to, I will be even happier. Plainly, if the statements in *Davis* and *Hammon* are deemed testimonial, as I expect they will be, then all the statements covered by S. 263 will be testimonial as well – and that means that the bill will be unconstitutional in all its applications unless the declarant testifies at trial. Indeed, the bill seems almost drawn to be unconstitutional, because the class of statements that it defines consists of accusatory statements made to persons who participate in the criminal justice system, or who would report such an accusation in ordinary course to prosecutorial authorities.

If the Committee is interested in this legislation, therefore, it should wait just a few months. If I am right, it will become apparent that the bill is unconstitutional on its face and that it should not be passed – even assuming the House supports the policy of the bill. (I believe that the policy of the bill is misguided for the same reason that I believe it is unconstitutional; it disregards one of the basic procedural components of our system, and this objection will remain whatever the Supreme Court does.)

And yet as I understand it, supporters of the bill argue that it should be passed because it could be applied constitutionally if the declarant testifies at trial and no longer adheres to the substance of the prior statement. It is unquestionably true that recantation is a large problem in the domestic violence context. It is also true that *Crawford* says that if the maker of a testimonial statement testifies at trial there is no confrontation problem under the United States Constitution. I believe that this is a bad rule, and if the Committee is interested I would be happy to elaborate. For now I will point out that it is by no means clear that the rule is the same with respect to the Michigan Constitution. Indeed, the Michigan Supreme Court has indicated good understanding of the fact that if the witness does not adhere not the substance of the prior statement before cross-examination begins, no effective cross with respect to the prior statement is possible.

Ruhala v. Roby, 379 Mich. 102, 124 (1967) ("Cross-examination presupposes a witness who affirms a thing being examined by a lawyer who would have him deny it, or a witness who denies a thing being examined by a lawyer who would have him affirm it. . . . If he refuses to adopt his prior statement as true, there can be no adversary cross-examination upon it. If he refuses to affirm, no question can be put to him which would shake his own confidence in his affirmation."); *see also People v. Durkee*, 369 Mich. 618 (1963). But let us put that aside and assume that it is constitutional to introduce a prior accusation if the accuser testifies at trial, even if she testifies inconsistently with the accusation. Let us further assume – which I do not believe – that it is good policy to allow such an accusation to be made in domestic violence cases, even though Michigan has chosen not to follow this rule with respect to unsworn statements in any other context, civil or criminal. *See* Michigan Rule of Evidence 801(d)(1)(A) (providing that a statement is exempted from the rule against hearsay if it is inconsistent with the declarant's testimony, *and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition*" (emphasis added)).

The problem is that this bill says nothing about the maker of the statement testifying. Indeed, the implication of the bill is that the declarant does not testify, because the prosecutor is required to give fifteen days' advance notice of intent to use the statement – an odd requirement if the statute is intended to operate only if the prosecutor produces the declarant as a witness, presumably with the hope that in the end she will stand by the prior accusation.

So this is the situation: It appears probable, and the Supreme Court may soon remove all doubt, that the bill is unconstitutional in all its applications, except under one condition that is not stated, or even hinted at, in the bill. I believe that is a terrible way to write legislation. As Associate Dean David Moran of Wayne State Law School has said, it is as if the Legislature passed a law saying, "The police may search a house at any time for any purpose" and responded to constitutional challenges by saying, "Well, warrantless searches are valid in exigent circumstances, so this law has *some* valid applications, and we really don't have tosay what they are."

If the aim of the Legislature is to write a law that would allow introduction of a prior accusation *if* the witness testifies at trial, then it ought to be written that way, and refusal to write it that way suggests that this is not genuinely the purpose of the bill. This makes the Legislature appear less than candid. It misleads the people of Michigan, and it is particularly cruel to victims of domestic violence, who will infer upon a natural reading of the bill that they can make an out-of-court accusation and avoid the unpleasant ordeal of testifying in front of the accused, subject to oath and cross-examination. Moreover, if the bill has any effect at all in court it is bound to sow confusion. Sooner or later, if the bill goes on the books in its present form, then some prosecutors will be tempted to use it according to its terms, and convictions entered on that basis will be reversed, with the necessity of releasing the accused or enduring an expensive retrial.

If the Committee is worried about the problem of recantation – and it is a valid concern –

then it should consider facilitating early depositions, held at a time and under conditions in which the witness is more likely to be willing to testify than at trial. And it should consider adopting standards and procedures for determining whether the accused has forfeited the right, in whole or in part, by his own wrongdoing. Another possibility would be simply to reconsider the policy behind the general limitation in MRE 801(d)(1)(A) on the introduction of prior inconsistent statements for substantive purposes. Some states, notably California, are more receptive than our state is to these statements. The problem of the recanting witness may arise more frequently in the context of domestic violence than in other contexts, but it is not clear that when it does arise the balance of considerations weighs more strongly in favor if admissibility in the domestic violence context than in other criminal contexts – and the strongest argument for admissibility, I think, is in the civil context. Personally, I think the rule should be changed in civil but not in criminal cases, but this is a valid debate.

Each of these possibilities raises substantial issues, and if it would be helpful I would be delighted to work with the Committee towards a satisfactory solution. But if this bill is passed at this time in its present form the primary consequence will be to make the Legislature appear irresponsible.